IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARL COFIELD, et al. *

Plaintiffs *

vs. * CIVIL ACTION NO. MJG-99-3277

LEAD INDUSTRIES ASSOCIATION, INC., et al. *

Defendants

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MEMORANDUM AND ORDER RE MOTIONS TO DISMISS THE COMPLAINT BASED UPON FAILURE TO IDENTIFY THE PRODUCT MANUFACTURER

The Court has before it the Defendants' Motions to Dismiss the Complaint Based Upon Failure to Identify the Product Manufacturer[1] and the materials submitted by the parties relating thereto. The Court has held a hearing and has had the benefit of the arguments of counsel.

I. INTRODUCTION

A. Factual Background

Six Plaintiffs filed this proposed class action[2] against

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[1]The two motions are the Motion to Dismiss the Complaint for Failure to Identify the Product Manufacturer [Paper No. 85] and the Motion to Dismiss the Complaint Based Upon Failure to Identify the Manufacturer [Paper No. 86].

[2]The proposed class consists of all persons who own and occupy single-family residential dwelling units situated within the State of Maryland which were constructed no later than 1978 and which either did or do contain lead paint.

various trade associations and lead-related corporations. Plaintiffs claim that their homes are contaminated and diminished in value by lead paint which the Plaintiffs contend is or was present on the interior and exterior of their properties.

Plaintiffs allege that each Defendant, or its predecessor in interest, "produced, mined, marketed, promoted, designed and/or manufactured its own lead products and promulgated, supported and/or promoted the production, marketing, designing and the manufacturing of the other defendants' lead products." First Am. Compl. at p. 18-26 ¶¶ 32-45. The "gravamen of the action" is that the Defendants "acted in concert, implemented their conspiracy and aided and abetted the fraudulent scheme which perpetuated and either constituted or materially contributed to the production, manufacture, design, promotion, marketing, sale, distribution and use of toxic and ultrahazardous lead products." Id. at p. 16 ¶ 28. This conspiracy is alleged to have occurred "during the period prior to 1978." Id. at p. 37 ¶ 87. Plaintiffs seek monetary damages and declaratory and equitable relief in connection with the abatement of the lead paint hazard in their homes.

The First Amended Complaint does not specify the specific circumstances surrounding any of the Plaintiff's property damage; what type of lead paint was applied to the properties;

who made or sold the lead pigment or lead paint that was applied to the properties; or when the products were made, sold or applied.

B. Procedural Background

Plaintiffs initially filed this action in the Circuit Court for Baltimore City on September 20, 1999. Plaintiffs filed their First Amended Complaint the following day. Plaintiffs assert the following claims:

COUNT I	Negligent Product Design
COUNT II	Negligent Failure to Warn
COUNT III	Supplier Negligence
COUNT IV	Strict Products Liability/Defective Design
COUNT V	Strict Products Liability/Failure to Warn
COUNT VI	Nuisance
COUNT VII	Indemnification
COUNT VIII	Fraud and Deceit
COUNT IX	Conspiracy
COUNT X	Concert of Action
COUNT XI	Aiding and Abetting
COUNT XII	Enterprise Liability

Defendants removed the case to this Court, and on March 15, 2000, this Court issued a decision retaining jurisdiction

over the lawsuit. By separate Order issued this date, the Court has dismissed Plaintiffs' claims for Negligent Product Design as to lead pigment[3] (Count I), Strict Products Liability/Defective Design as to lead pigment[4] (Count IV), Nuisance (Count VI), Indemnification (Count VII) and Fraud and Deceit (Count VIII).

The instant Motion is based upon each Plaintiff's failure to identify the product manufacturer responsible for their specific injuries.

II. LEGAL STANDARD

The Court must deny a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure unless it "appears beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957). "The question is whether in the light most favorable to the Plaintiff, and with every doubt resolved in his behalf, the Complaint states any valid claim for relief." Wright & Miller, Federal Practice and Procedure: Civil 2d, § 1357, at

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[3]This claim remains pending insofar as it pertains to lead paint.

[4]This claim also remains pending insofar as it pertains to lead paint.

336. The Court, when deciding a motion to dismiss, must consider well-pled allegations in a complaint as true and must construe those allegations in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969). The Court must further disregard the contrary allegations of the opposing party. A.S. Abell Co. v. Chell, 412 F.2d 712, 715 (4th Cir. 1969).

III. DISCUSSION

Defendants allege that the Plaintiffs' failure to identify the particular manufacturer of the lead paint which is present on their individual homes is fatal to all of the Plaintiffs' claims under Maryland law. Defendants contend that the Maryland courts have universally required a plaintiff to identify a specific tortfeasor, and that Plaintiffs' inability to establish which manufacturer is directly responsible for each individual Plaintiffs' particular injury warrants dismissal of the entire First Amended Complaint.

At a general level, it is beyond dispute that, as Defendants contend, proximate cause is a requirement in any tort action. E.g., Medical Mutual Liability Soc'y of Maryland v. B. Dixon Evander and Associates, Inc., 660 A.2d 433, 439

(Md. 1995).[5] A plaintiff in a tort action must prove, by a preponderance of the evidence, that the alleged tortious injury is the cause of plaintiffs' injury. E.g., Fennell v. Southern Maryland Hosp. Center, Inc., 580 A.2d 206, 211 (1990).[6] The Maryland Court of Special Appeals has also stated, in a traditional products liability case, that the plaintiff must plead and prove "the attribution of the defect to the seller." Jensen v. American Motors Corp., 437 A.2d 242, 247 (Md. Ct. Spec. App. 1981).

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[5]Although Defendants cite this case correctly for the general proposition for which it stands, it does not address any of the issues presented by the case at Bar in a meaningful fashion. Rather, the case dealt with an insurance broker's allegation that defamatory statements contained in a letter issued by an insurer which had rightfully terminated its broker arrangement caused damage to the broker's existing business relationships. Medical Mutual, 660 A.2d at 435. The Court rejected the broker's tortious interference with business relationship claim based upon the broker's inability to prove that his it was more likely that the broker's damages had been caused by the defamatory statements rather than the termination of the business relationship. Id. at 440-41. The problem, therefore, was the proof presented, and the case involved a choice between two unconnected causes, one of which was allegedly tortious and the other of which was clearly not.

[6]Fennell, like Medical Mutual, is correctly cited by Defendants for a broad principle of tort law, that is, that proximate cause is a required element in any tort action, but addresses the question of causation in a context that is completely different from the case at Bar. The cited portion of Fennell involved the recognition of a "new tort allowing full recovery for causing death by causing a loss of less than 50% chance of survival." Fennell, 580 A.2d at 211. In this context, the Maryland Court of Appeals stated, in dicta, that it was "unwilling to relax traditional rules of causation" to recognize that particular tort. Id.

The First Amended Complaint in the instant lawsuit, however, presents detailed allegations of a scheme on the part of the Defendants to conceal the hazards associated with their lead products, with the ultimate goal of perpetuating the use of lead paint in residential properties. When viewed in this fashion, it presents something entirely different from the traditional tort or product liability action to which the general rules acknowledged above have been rigidly applied. The Plaintiffs in this action allege a common plan followed by the lead pigment manufacturers. Plaintiffs claim[7] that they have sued all, or at least practically all, of those lead pigment manufacturers in this action, and that each of the Defendants was a member of the conspiracy. Under the Plaintiffs' theory, the lead pigment contained in the lead paint which is, or was, present on each of the plaintiff's homes was necessarily manufactured by one of the members of the conspiracy. Plaintiffs claim that they are not required to prove which conspirator's pigment or paint it was, provided that they can establish the underlying wrongful act and that the tortious act was within the scope of the conspiracy. Under this line of reasoning, as long as the First Amended

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[7]**In the context of the instant motions to dismiss, the Court must disregard the contrary allegations made by the Defendants. Chell, 412 F.2d at 715.**

Complaint adequately pleads the commission of a single underlying tort by a conspirator within the scope of the conspiracy, the Plaintiffs have a viable claim against each of the Defendants whom they can hold liable as a co-conspirator.

The idea that individuals who join together to perform an unlawful act can be held jointly liable for the damages caused by the act is hardly new to tort law. See Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 46 at 322-23 and cases cited therein; Prosser, Joint Torts and Several Liability, 25 Calif. L. Rev. 413 (1937). In imposing joint liability in a case of group assault, an early English court reasoned that " . . . [with] all coming to do an unlawful act, and of one party, the act of one is the act of all . . . ." Sir John Heydon's Case, 77 Eng. Rep. 1150 (1613). Throughout the development of tort law, in Maryland and elsewhere, joint tortfeasors have been held liable for the actions of others with whom they acted in concert, and courts have, at least on occasion, recognized the need to permit plaintiffs to proceed where they cannot establish a causal connection between their injuries and a particular tortfeasor. See Restatement (Second) of Torts § 433B(2)-(3).

In a products liability case concerning the blasting cap industry, Judge Weinstein of the United States District Court for the Eastern District of New York discussed the problems

faced by Plaintiffs who seek to hold manufacturers of a product liable based upon theories of joint liability. See Hall v. E.I. Du Pont De Nemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972). Drawing from the law of many jurisdictions,[8] Judge Weinstein noted that joint liability had historically been imposed when a group of actors exercises joint control over a risk of harm. Id. at 371. In such a case, the courts will:

> Impose joint liability on groups whose actions create unreasonable hazards of risks of harm, even though only one member of the group may have been the "direct" or physical cause of the injury. Where courts perceive a clear joint control of risk . . . the issue of who "caused" the injury is distinctly secondary to the fact that the group engaged in joint hazardous conduct.

Id. at 372. Under this analysis, joint liability may be shown where, as Plaintiffs allege here, there is an explicit agreement and joint action among the defendants with regard to warnings and other safety features. Id. at 373.

The Maryland cases relied upon by the Defendants for the proposition that a plaintiff must plead and prove the identity of a specific manufacturer do not address the serious question which is presented by the case at Bar, and are unhelpful to a

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[8]Because of complex choice of law problems involved in the case, Judge Weinstein "assumed the existence of a national body of state tort law," and considered cases from across the nation. 345 F. Supp. at 360.

meaningful analysis of the theories presented by this lawsuit.[9] Several of the Maryland cases relied upon by Defendants do not even address the issue of causation or identification at all, or do so entirely in dicta.[10] The Court must therefore consider whether there is any possibility that the Maryland Court of Appeals would allow the Plaintiffs

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[9] See, e.g., Owens-Illinois, Inc. v. Zenobia, 602 A.2d 1182, 1184 (Md. 1992) (requiring the identification of a particular manufacturer for recovery against that manufacturer where plaintiff did not allege a conspiracy and failed to establish exposure to that defendant's product); Nissen Corp. v. Miller, 594 A.2d 564, 570-71 (Md. 1991) (addressing the requirement of a causal relationship between a defendant's act and the plaintiff's injury in the successor liability context); Owens-Corning v. Walatka, 725 A.2d 579, 593 (Md. Ct. Spec. App. 1999) (under "proximity, frequency and regularity" test applicable to asbestos personal injury actions, in order to recover against a specific manufacturer, plaintiff must show that he was exposed to that manufacturer's product); Jensen v. American Motors Corp., 437 A.2d 242, 247 (Md. Ct. Spec. App. 1981) (affirming judgment for single defendant auto manufacturer where plaintiff failed to prove that the car was defective or that any defect was the cause of the plaintiff's accident); Undeck v. Consumer's Discount Supermarket, Inc., 349 A.2d 635, 637 (Md. Ct. Spec. App. 1975) (affirming directed verdict in favor of product manufacturer where there was no proof regarding the identity of any potential manufacturer and no apparent allegation of conspiracy or joint liability).

[10] See, e.g. Orkin v. Holy Cross Hosp. of Silver Spring, Inc., 569 A.2d 207, 210 (Md. 1990) (in a medical malpractice action against surgeon and anesthesiologist, refusing to address the question of whether the plaintiff's inability to identify which of two defendants caused her injuries required summary judgment because the trial court had not considered the issue; acknowledging that some courts have fashioned a remedy for plaintiffs under circumstances similar to those involved in that case); Fennell, supra note 2.

to proceed on any of the collective action theories alleged in the First Amended Complaint, which include concert of action, enterprise liability, conspiracy, and aiding and abetting.

A. Concert of Action and Enterprise Liability

Defendants correctly assert that several federal courts applying Maryland law have previously rejected concert of action and enterprise liability in products liability actions where the plaintiffs have been unable to establish that a particular defendant was responsible for causing their individual injury. See Tidler v. Eli Lilly & Co., 851 F.2d 418 (D.C. Cor. 1988); Herlihy v. Ply-Gen Industries, Inc., 752 F. Supp. 1282 (D. Md. 1990); Lee v. Baxter Healthcare Corp., 721 F. Supp. 89 (D. Md. 1989), aff'd mem., 898 F.2d 149, 1990 WL 27325 (4th Cir. 1990). Defendants argue that these cases establish that the Maryland courts do not recognize concert of action or enterprise liability, and preclude Plaintiffs from recovering against the Defendants under a concert of action or enterprise liability theory.

Plaintiffs point to the case of Ford Motor Corp. v. Wood, 703 A.2d 1315 (Md. Ct. Spec. App. 1998) as a signal that the Maryland courts would allow their concert of action theory to proceed. In Wood, the Maryland Court of Special Appeals suggested that concert of action might allow the imposition of

liability upon an assembler for a component which he did not manufacture on the basis that the assembler "engaged in a concerted action with others to market, distribute and conceal the dangers of the defective component." Id. at 1332. However, the Wood court stated that the concert of action theory requires affirmative conduct "linked to the specific product that caused the plaintiff's injuries."[11] Id. (emphasis in original).

As Defendants point out, even in jurisdictions where the concert of action theory has been adopted, a plaintiff is required to identify the specific manufacturer who produced the product which caused the plaintiff's injury. See, e.g., Hurt v. Philadelphia Housing Authority, 806 F. Supp. 515, 531-32 (E.D. Pa. 1992); Santiago v. Sherwin Williams Co., 794 F. Supp. 29, 32-22 (D. Mass. 1992); Skipworth v. Lead Industries Ass'n, 960 A.2d 169, 175-76 (Pa. 1997). The only case cited by the Plaintiffs which indicates to the contrary is Marshall v. Celotex, 652 F. Supp. 1581 (E.D. Mich. 1987), in which the United States District Court for the Eastern District of

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[11]In addition, the Wood court distinguished all of the cases which had been cited by the plaintiff in support of her concert of action claim on the basis that in the cited cases, the plaintiff was injured by an identified manufacturer's product. Id. at 1332-33 (citing Bich v. General Elec. Co., 614 P.2d 1323 (Wash. Ct. App. 1980); Steward v. Scott-Kitz Miller Co., 626 P.2d 329 (Okla. Ct. App. 1981); Krutsch v. Walter Collin GmBh, 495 N.W.2d 208 (Minn. Ct. App. 1993)).

Michigan refused to dismiss a concert of action claim against asbestos manufacturers, notwithstanding the plaintiff's inability to establish which manufacturer's product he had been exposed to. Id. at 1582. The Marshall court stated:

> The [defendants'] motion presents a difficult causation issue. Defendants' logic is forceful: without an identification requirement, each manufacturer of asbestos products becomes an insurer for all manufacturers of the products. But the equity of plaintiff's position is compelling: if manufacturers cooperate to conceal product risk, and if the concealed risk subsequently causes injury, justice demands a remedy. The concert of action theory rests upon this equity to justify joint and several liability against any manufacturer that substantially contributes to an injury by coordinating activity with other manufacturers to conceal information.

Id. (footnote and citations omitted);[12] see also Hall, 345 F.

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[12]Defendants contend that the Marshall court later "reversed itself," citing Marshall v. Celotex Corp., 691 F. Supp. 1045, 1047 (E.D. Mich. 1988). An examination of the subsequent opinion reveals that the court did no such thing. In the earlier decision, the Court refused to grant the defendants' motion for summary judgment on the concert of action claim, which had been premised upon the plaintiff's inability to identify the product manufacturer. 652 F. Supp. at 1582. The Court determined that the claim should proceed to trial; however on the morning of trial, the plaintiff admitted that she would be unable to introduce evidence that even one of the defendants had supplied the asbestos-containing products which caused the injury. 691 F. Supp. at 1046. By that point, only four defendants remained in the action. Id. at 1048. While still acknowledging that, "[u]nder the concert of action theory identification of the tortfeasor who is the cause in fact of the injury is secondary," the court concluded that concert of action could only be applied where (1) the plaintiff could establish identification of the tortfeasor, or (2) the plaintiff had joined a large enough group of manufacturers so as to find

Supp. at 370-80. The undersigned finds the reasoning of the Marshall decision compelling. However, in light of the language contained in the Maryland Court of Special Appeals' decision in Wood, which indicates that the identity of the product manufacturer would have to be established in Maryland under a concert of action theory, the Court finds it unlikely that the Maryland courts would follow the Marshall decision and allow a concert of action theory to proceed where the plaintiff was unable to prove the identity of the product manufacturer which caused his or her injuries.

Plaintiffs have presented no case which indicates that the Maryland Court of Appeals would allow their claim premised upon enterprise liability to remain.[13]

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that "a majority" of the industry was present before the court. Id. (emphasis added); see Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich. 1984); Cousineau v. Ford Motor Co., 363 N.W.2d 721 (Mich. Ct. App. 1985); Hall, 345 F. Supp. at 358. This is precisely what the Plaintiffs in the case at Bar allege that they have done. See First Am. Compl. ¶¶ 73, 368, 379.

[13]Plaintiffs cite to Bartholomee v. Casey, 651 A.2d 908, 918-19 (Md. Ct. Spec. App. 1994) and Thodos v. Bland, 542 A.2d 1307, 1315 (Md. Ct. Spec. App. 1988) as signaling a trend in the Maryland decisions toward relaxing the traditional causation requirements. These cases, however, deal with the alternative liability theory, as opposed to the concert of action or enterprise liability theories. Although these cases might provide a persuasive reason for denial of a motion to dismiss an alternative liability claim, they do not suggest that the Maryland courts would allow the Plaintiffs to proceed on concert of action or enterprise liability. The Court does note that the Plaintiffs have included an alternative

B. Conspiracy and Aiding and Abetting

Defendants argue that the Plaintiffs' inability to establish which manufacturer's paint is, or was, present in their homes is fatal to their claims of civil conspiracy and aiding and abetting. As Defendants correctly point out, it is well established that under Maryland law, neither civil conspiracy nor civil aider and abettor liability may be found without proof of an underlying tortious act, and that neither is an independent tort.[14] E.g., Alleco, Inc. v. The Harry & Jeannette Weinberg Foundation, Inc., 665 A.2d 1038, 1044-45, 1050 (Md. 1995). Nevertheless, it is equally clear that Maryland recognizes both civil conspiracy and civil aiding and abetting as means to impose liability for underlying torts. Id.

A civil conspiracy is "a combination of two or more persons by an agreement or understanding to accomplish an unlawful act . . . with the further requirement that the act or the means must result in damages to the plaintiff." Green

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liability claim in their proposed Second Amended Complaint; however the Court is herein addressing only the allegations contained in the First Amended Complaint, which includes no alternative liability claim.

[14]This distinguishes civil conspiracy and civil aiding and abetting from their counterparts under criminal law. Under criminal law, both conspiracy and aiding and abetting are independent crimes, and they are committed at the time of the parties' agreement.

v. Washington Suburban Sanitary Comm'n, 269 A.2d 815, 824 (Md. 1970). Any member of the conspiracy may be held liable for acts performed within the scope of the conspiracy. Under Maryland law, "[a] person may be held [civilly] liable as a principal for [a tort] if he, by any means, encouraged, incited, aided or abetted the act of the direct perpetrator of the tort." Duke v. Feldman, 226 A.2d 345, 347 (Md. 1967). The terms "aid" and "abet" have the same meaning under civil and criminal law, and in both contexts, are defined according to "common parlance." Id. (citing Seward v. State, 118 A.2d 505, 507 (Md. 1955). Thus, an "aider" is one who "assist[s], support[s] or supplement[s] the efforts of another." Seward, 118 A.2d at 507. An "abettor" is "one who instigates, advises or encourages the commission of a[n unlawful act]." Id.

Defendants contend that the Maryland decisions uniformly require the identification of a direct perpetrator of the underlying tort before civil conspiracy or aider and abettor liability may be imposed.[15] Alleco, 665 A.2d at 1045 (stating that "[o]ne of the requirements for tort liability as an aider and abettor is that there be a direct perpetrator of the

[15]In the Motion that is the subject of the instant Memorandum and Order, the defendants do not challenge the conspiracy and aiding and abetting allegations of the First Amended Complaint on any ground other than the failure to identify the product manufacturer.

tort."); Alexander Inc. v. B. Dixon Evander & Associates, Inc., 650 A.2d 260, 265 n.8 (Md. 1994); see In re Orthopedic Bone Screw Products Liability Lit., 193 F.3d 781, 789 (3rd Cir. 1999). When read in their entirety, however, these decisions simply re-state the general rule that there can be no tort liability for civil conspiracy or aiding and abetting absent proof of the underlying tort, a proposition which Plaintiffs do not, and could not, contest. Although the commission of any underlying tort undisputably requires a perpetrator, none of the decisions cited by Defendants even address the issue of whether that perpetrator needs to be identified, as distinct from being established to be a member of the conspiracy.[16] Accordingly, none of the cited cases can be considered as holding, without limitation, that the failure

[16]Defendants point out that other courts are in agreement that "a civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act that proximately caused his injury." Beck v. Prupis, 162 F.3d 1090, 1098 n.18 (11th Cir. 1998) (emphasis added). Neither the Plaintiffs nor this Court would suggest that the Plaintiffs need not prove that someone in the conspiracy committed a tortious act within the scope of the conspiracy. See Alleco, 665 A.2d at 1045; Kimball v. Harman and Burch, 34 Md. 407, 409-11 (1871). However, none of the cases cited by the Defendants stand for the proposition that the "someone" must be identified; they simply state that he must be a member of the conspiracy, acting within the scope of the conspiracy.

to allege the precise identity of the perpetrator is fatal to a claim for civil conspiracy or civil aiding and abetting.[17]

The First Amended Complaint alleges a common plan among all of the Defendants to market lead paint for use in residential properties, including marketing and selling lead pigment and lead paint without adequate warnings.[18] Plaintiffs claim that the alleged conspirators, including the lead pigment manufacturers sued in this action, collectively produced and

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[17]Contrary to Defendants' suggestion, Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981), which involved DES, does not compel a different conclusion. In that case, the Defendants were merely "seven of the one-hundred eighteen companies manufacturing or distributing DES [at the time of plaintiff's injuries.]" Id. at 1007. Admittedly, the Ryan court noted the plaintiff's inability to identify the manufacturer of the DES which her mother ingested, and found this failure of proof to be one of many reasons justifying dismissal of the conspiracy claim. However, the undersigned Judge is of the opinion that the portions of the Ryan opinion relied upon by the Defendants analyze the issue of manufacturer identification on a superficial level, and there is no indication that the Ryan court analyzed the issue in the way that this Court sees it. Moreover, the plaintiff in Ryan was unable to establish the existence of a conspiracy at all, which provided a much more compelling reason for dismissing her claim, and makes it unlikely that the manufacturer identification issue was given as much attention as it deserves in the instant lawsuit.

[18]The Court notes that the claims for lead pigment defective design, fraud, nuisance and indemnification have been dismissed. Accordingly, these causes of action cannot constitute the underlying tort for conspiracy or aiding and abetting. However, there is no reason why Plaintiffs' lead paint defective design and lead pigment and lead paint failure to warn claims, which have not been independently challenged, would not satisfy the requirement that there be an underlying tort.

marketed all (or practically all) of the lead pigments used in lead paint.[19] First Am. Compl. p. 34 ¶ 73, p. 121 ¶ 368, p. 123 ¶ 379. Plaintiffs allege that the Defendants agreed to engage in tortious activities regarding lead paint and lead pigment, including marketing and promoting lead products without warnings concerning the dangers associated with exposing children to lead. Id. at p. 119 ¶¶ 360-61; p. 123 ¶¶ 377-78. The First Amended Complaint contains detailed allegations concerning specific actions taken by all Defendants, individually, collectively, and through trade associations which they were members of, in furtherance of their agreement. Id. at ¶¶ 169-286.

As explained above, when viewed in the light most favorable to the Plaintiffs, the conspiracy and aiding and abetting theories present a claim that each Plaintiff's home contains lead pigment which was manufactured by one of the members of the alleged conspiracy and was placed on the Plaintiff's home as a result of one or more tortious acts which is alleged to have been done in furtherance of the conspiracy. The instant case presents a situation materially different from

[19]Again, in the current procedural context, the Court must disregard Defendants' contrary allegations. Chell, 412 F.2d at 715.

those considered in any of the any of the precedents relied upon by the Defendants or discovered by the Court.

Following a thorough examination of the authorities relied upon by the Defendants, the Court concludes that the issue is not nearly as simple as Defendants contend. Rather, the Court finds that this case presents difficult and novel questions of Maryland law, for which there is no clear answer. See Orkin, 569 A.2d at 210 ("the problem of multiple defendant liability . . . is both difficult and interesting."). Given the novel questions of state law presented by this case, the Court is unwilling to reject the Plaintiffs' conspiracy and aiding and abetting theories, particularly at the dismissal stage. As the record develops further, it may become clear that Plaintiffs' collective liability claims lack evidentiary support. However, this is a case in which further development of the record is necessary prior to a final ruling on the legal questions presented.

Of course, Plaintiffs will have to bear a heavy burden to prevail on their conspiracy theory. They will have to establish that each of the Defendants agreed to accomplish the tortious acts alleged in the First Amended Complaint; that the underlying tortious acts were performed by a member of the conspiracy, within the scope of the conspiracy; and that those

tortious acts proximately caused the damages claimed by the Plaintiffs.

To succeed on their aiding and abetting theory, the Plaintiffs will have to prove that the Defendants committed tortious acts and will have to establish a causal relationship between those tortious acts and their damages. Additionally, Plaintiffs will be required to show that each Defendant either (1) assisted, supported or supplemented the tortious acts committed by a member of the conspiracy, or (2) instigated, advised or encouraged the commission of the tortious acts by a member of the conspiracy. Defendants' contentions regarding the existence of other lead pigment manufacturers may well be relevant at later stages of this litigation.[20] However, in light of the allegations in the First Amended Complaint, Defendants' contrary factual assertions must be ignored in the current procedural context.

In sum, the Motions to Dismiss the First Amended Complaint shall be denied. In view of the existence of serious unresolved state law issues, the denial of the instant motions is, expressly, without prejudice. By separate order, this case

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[20]This Court is not now deciding whether the Plaintiffs would have to establish that the Defendants produced all, or "practically all" of the lead pigment which was sold during the relevant time period, or whether they merely must prove that, more likely than not, the underlying tort was committed by a conspirator. See Marshall, 691 F. Supp. at 1048.

is being remanded to the Circuit Court for Baltimore City. On remand, the State Court judge may well decide to reconsider this Court's ruling.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss the Complaint Based Upon Failure to Identify the Manufacturer [Paper Nos. 85 and 86] are DENIED WITHOUT PREJUDICE.

SO ORDERED this 17th day of August, 2000.

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Marvin J. Garbis
United States District Judge